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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 DAVID BLACK, an adult individual, and,
10 ANJA WREDE, an adult individual,

11 Plaintiffs,

C08-1699Z

12 v.

ORDER

13 GRANGE INSURANCE ASSOCIATION, an
14 insurance company,

15 Defendant.

16 THIS MATTER comes before the Court on Plaintiffs' Motion for Declaratory
17 Judgment/Partial Summary Judgment Regarding Grange Insurance's Duty to Defend, docket
18 no. 14, and Defendant's Motion for Summary Judgment, docket no. 37. Having considered
19 the briefs and declarations filed in support of and in opposition to the motions, and having
20 heard oral argument on Thursday, November 5, 2009, the Court now enters the following
21 Order.

22 **I. BACKGROUND**

23 **A. Case Overview**

24 This case involves a dispute over the status of two persons – Plaintiffs David Black
25 and Anja Wrede – as “insureds” under a property and liability policy issued by an insurer,
26 Defendant Grange Insurance Association (“Grange”). The policy lists “Paula Einstein” as

1 the named insured. However, the policy allows for certain other persons to be deemed
2 “insureds” under the policy. Black and Wrede lived on Einstein’s farm property at the time
3 of an accident to Katharina Haerer, a guest on the farm. After the accident, Haerer sued
4 Black, Wrede and Einstein. Grange defended Einstein in the underlying lawsuit, but denied
5 Black and Wrede a defense. Black and Wrede now contend that Grange breached its duty to
6 defend them in the underlying lawsuit.

7 **B. Underlying Lawsuit**

8 On May 5, 2008, Haerer sued Black, Wrede, and Einstein in Grays Harbor County
9 Superior Court, Haerer v. Black, Cause No. 08-2-00568-9. Scuderi Decl., docket no. 19, Ex.
10 G (Haerer Compl.). In describing the parties to the underlying lawsuit, the Haerer Complaint
11 alleges that Haerer “suffered serious and permanent personal injuries . . . while temporarily
12 residing on a horse farm in Grays Harbor County, State of Washington, as a participant in a
13 training program in which she was learning about training horses” (§ 1.1); that, at the time of
14 the accident, Black and Wrede “were running the horse training program in which [Haerer]
15 was participating and were residing on the subject horse farm” (§ 1.2); that “Black has . . .
16 claimed that, at the time [Haerer] sustained the injuries, . . . he owned an interest in the real
17 property on which the subject horse farm was situated and the business of the farm” (§ 1.2);
18 that “Einstein has claimed that, at the time [Haerer] sustained the injuries . . . , Einstein
19 owned an interest in the real property on which the subject horse farm was situated and the
20 business operated on that farm,” and that, “[i]n fact, . . . Einstein has claimed that she was the
21 sole owner of the real property and the business” (§ 1.3).

22 In describing the factual background of the underlying lawsuit, the Haerer Complaint
23 alleges that Haerer “was accepted into the [horse training] program for the time period from
24 July 10, 2006, to October 10, 2006;” “[t]he training was to be provided by . . . Black and . . .
25 Wrede;” and “[t]he facilities for the training program were a horse farm provided by . . .
26 Black and . . . Einstein” (§ 2.1); that “[d]uring the time that [Haerer] was on Defendants’

1 horse farm, she received limited training from . . . Black and also fed Defendants' horses,
2 cleaned their stables and horses, rode and helped train some of their horses, and provided
3 care for the toddler child of . . . Black and Wrede" (§ 2.2); that "[o]ne of Defendants' horses,
4 Aidan" exhibited "dangerous" and "difficult" behavior that Black and Wrede "personally
5 observed" and that Einstein "knew or should have known" about "as [Einstein] previously
6 lived on the horse farm with . . . Black and/or visited the horse farm and/or otherwise
7 personally observed Aidan as one of the horses of the horse business [Einstein] conducted
8 and participated in with . . . Black" (§ 2.3); that "Black and . . . Wrede ignored [Haerer's]
9 concerns" about Aidan (§ 2.4); that "[o]n or about September 24, 2006, . . . Black left the
10 farm, reportedly to participate in a one week bicycle fair in Las Vegas, Nevada;" "[t]he next
11 day, . . . Wrede also left the farm;" "[t]his left [Haerer] and another young German trainee
12 who had come to the horse farm . . . all alone on the horse farm to care for all thirty of
13 Defendants' horses and the toddler child;" and Haerer "had no choice but to take care of the
14 . . . horses and the child" (§ 2.5); that "[o]n or about September 27, 2006, while [Haerer] was
15 attempting to handle Aidan in the process of the young trainee feeding the horses, Aidan
16 kicked [Haerer] in the face, knocking her unconscious and causing . . . injuries" (§ 2.6); that
17 "[a]s a result of the incident, [Haerer] sustained severe personal bodily injuries" (§ 2.7); and
18 that Haerer "has incurred . . . expenses for treatment . . . , lost earning capacity, and other
19 expenses" (§ 2.8).

20 In describing Haerer's causes of action, the Haerer Complaint alleges that Black and
21 Wrede were "negligent . . . because they failed to exercise reasonable and ordinary care in
22 their training of [Haerer]" and because Black and Wrede "knew or should have known that
23 [Haerer] was not properly trained to safely handle the horse Aidan" (§ 3.1); that Black and
24 Wrede were "negligent . . . because they failed to exercise reasonable and ordinary care when
25 they left [Haerer] alone on the horse farm with another young trainee to care for . . . the horse
26 Aidan, along with all the other horses and the toddler child" (§ 3.2); that Black and Wrede

1 “knew or should have known that [Haerer] was not able to engage safely in activities with
2 Aidan” (§ 3.3); that Black and Wrede “acted with willful and wanton disregard for the
3 safety” of Haerer (§ 3.4); that Black and Einstein “are jointly and severally liable to [Haerer]
4 . . . as equine activity sponsors” (§ 3.5); that “Einstein is also jointly and severally liable with
5 . . . Black to [Haerer] as . . . Black’s principal, partner, and/or joint venturer and/or because
6 she profited from the horse farming business and other activities conducted on the horse farm
7 by . . . Black” (§ 3.6); and that Defendants’ conduct caused Haerer’s injuries and damages
8 (§ 3.7).

9 **C. Grange’s Denial of Defense to Black and Wrede**

10 Within days of the accident, on or about October 1, 2006, Black informed Grange of
11 the Haerer accident. Black Decl., docket no. 15, ¶ 5. Prior to Haerer’s filing of her lawsuit
12 against Black, Wrede and Einstein, the Grange determined that Black and Wrede did not
13 qualify as insureds under the policy at issue. Scuderi Decl., Ex. D (unsigned letters to Black
14 and Wrede dated Jan. 15, 2008 and Feb. 15, 2008) at 155, 160-65. Grange set forth the same
15 position in letters dated after the May 5, 2008 filing of the Haerer lawsuit, but prior to Black
16 and Wrede’s tender of defense. *Id.*, Ex. D (unsigned letters dated May 20, 2008) at 166-71.

17 Lynn Perry, Grange’s Senior Claims Representative, asserts that Black and Wrede
18 “tendered their defense in the *Haerer v. Black* lawsuit to the Grange Insurance Association
19 by letters dated July 9 and 10, 2008.” Perry Decl., docket no. 27, ¶ 4, Ex. A (letters to
20 Grange dated July 9, 2008, and July 10, 2008). In these letters, Plaintiffs’ attorney Jon
21 Cushman argued that Black and Wrede “were covered. . . [as] farm hands, living on the
22 property,” and that Black was covered as Einstein’s partner in the farm business, as
23 Einstein’s employee, and as Einstein’s real estate manager. *Id.*, Ex. A (July letters) at 1-2.
24 Perry responded on behalf of Grange by letter dated July 21, 2008, in which she explained
25 that Grange was denying “Mr. Black’s and Ms. Wrede’s tender of defense because neither of
26 them fell within the scope of Section II ‘Who is an Insured’ in the liability coverage of the

1 FarmPak policy issued to Paula Einstein.” Perry Decl. ¶ 4; Scuderi Decl., Ex. D (unsigned
2 letter dated July 21, 2008) at 156-59. Specifically, Grange rejected the arguments that Black
3 was an insured as a partner or employee of Einstein, that Black and Wrede were insureds as
4 Einstein’s farm hands, and that Black was an insured as Einstein’s real estate manager.
5 Scuderi Decl., Ex. D at 158-59.

6 With respect to Plaintiffs’ assertion that they were “farm hands,” the Grange
7 responded:

8
9 Your letters also state that both Mr. Black and Ms. Wrede were farm hands
10 living on the property. In SECTION II - WHO IS AN INSURED of Form
11 2000 0305 at paragraph 2(a), a farm employee is an insured only for acts within
12 the scope of their employment by the named insured or while performing duties
13 related to farming. Please now refer to SECTION IV [sic] - DEFINITIONS of
14 Form 2000 0305 at paragraph 7 where the term ‘farming’ is defined as an
15 agricultural or aquacultural enterprise. There is no allegation in the complaint
16 that Ms. Haerer was injured when Mr. Black or Ms. Wrede were engaged in
17 farming activities as defined in Form 2000 0305. To the contrary, Ms. Haerer
18 states that neither Mr. Black nor Ms. Wrede were present on the farm when the
19 incident occurred as they had left the state to participate in a week long bicycle
20 fair in Las Vegas. In addition, the horse training program operated by Mr.
21 Black and Ms. Wrede that Ms. Haerer was participating in during 2006 can not
22 be construed as an agricultural or aquacultural enterprise to qualify as farming
23 in order for the liability coverage to apply.

24 Id., Ex. D at 158.

25 Black and Wrede ultimately settled Haerer’s claims against them in the underlying
26 lawsuit. Black Decl. ¶ 7. As part of the settlement, Haerer executed a covenant not to
execute against Black, and Haerer dismissed with prejudice her claims against Wrede. Id.

D. Grange’s Provision of a Defense for Einstein

After Haerer filed the underlying lawsuit, Einstein tendered her defense to Grange.
Perry Decl. ¶ 3. Grange accepted her tender without reservation and assigned defense
counsel to represent Einstein. Id. Public records indicate that Einstein was dismissed from
the underlying lawsuit on September 11, 2009. Einstein is not a party to the present lawsuit.

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1 **E. Present Lawsuit**

2 On November 21, 2008, Black and Wrede filed the present lawsuit against Grange,
3 seeking a declaratory judgment that Grange breached its duty to defend, and asserting claims
4 for breach of contract, bad faith, violations of the Washington Consumer Protection Act,
5 RCW 19.86 et seq., violations of the Insurance Fair Conduct Act, RCW 48.30.015, and
6 negligence. Compl. ¶¶ 11-22.

7 **F. The Insurance Policy**

8 The policy at issue is a Farmpak property and liability policy issued by Grange
9 Insurance Association, Policy No. FP01010131. Scuderi Decl., Ex. A (the “Policy”).¹ The
10 named insured in the Policy is “Paula Einstein.” Id., Ex. A (Policy) at GRANGE 0858
11 (“Liability Declarations”). In the “Farming and Personal Liability Insurance” portion of the
12 Policy, Section II is entitled, “Who Is an Insured.” Section II provides the following
13 pertinent definitions of an “insured:”

14 1. Insured means you, and if you are:

15 a. An individual:

16 (1) Residents of your household who are your relatives;

17 * * *

18 b. A partnership or joint venture, your members, your partners,
19 and their spouses are also insureds, but only with respect to the
20 conduct of your **farming** operations.

21 * * *

22 2. Each of the following is also an insured:

23 a. Your volunteer workers only while performing duties related to your

24 ¹ The first page of this exhibit is a certification that this is a “copy of the Farmpak
25 Insurance policy issued to Paula Einstein by Grange Insurance Association bearing policy
26 number FP01010131 in effect September 27, 2006.” See also Perry Decl. ¶ 2 (Grange’s Senior
Claims Representative’s statement that this policy was in effect on Sept. 27, 2006). In contrast,
the policy attached as Exhibit A to the Complaint appears to be an outdated policy, and,
therefore, has not been considered by the Court.

1 **farming**,² or your **farm employees**³ . . . , but only for acts within the
2 scope of their employment by you or while performing duties related to
3 your **farming**.

4 * * *

5 b. Any person (other than your **farm employee** or volunteer
6 worker), or any organization while acting as your real estate
7 manager.

8 Id., Ex A (Policy) at GRANGE 0928-0929 (Form 2000 0305) (emphasis in original). Section
9 II further provides that “No person or organization is an insured with respect to the conduct
10 of any current or past partnership, joint venture or limited liability company that is not shown
11 as a Named Insured in the Declarations.” Id., Ex. A at GRANGE 0929.

12 **G. The Application for Insurance**

13 The application for insurance, which was originally submitted in March 1998, gave
14 the option of identifying the applicant as an “individual,” a “partnership,” a “joint venture,”
15 or a “corporation.” Einstein Decl., docket no. 28, ¶ 16, Ex. F (Farmpak Application). The
16 “individual” box was marked, and the boxes for “partnership,” “joint venture” and
17 “corporation” were unmarked. Id., Ex. F (Farmpak Application) at GRANGE 0386
18 (“APPLICANT IS INDIVIDUAL ☒ PARTNERSHIP ☐ JOINT VENTURE ☐
19 CORPORATION ☐”). The application was left blank after the following statement: “LIST
20 ALL MEMBERS OF PARTNERSHIP / JOINT VENTURE / CORPORATION.” Id., Ex. F
21 at GRANGE 0386.

22 ² Section V of the “Farming and Personal Liability Insurance” portion of the Policy
23 defines “farming,” in pertinent part, as “the operation of an agricultural . . . enterprise.” Scuderi
24 Decl., Ex. A (Policy) at GRANGE 0932.

25 ³ Section V of the “Farming and Personal Liability Insurance” portion of the Policy
26 defines a “farm employee” as “an insured’s employee whose duties are principally in connection
 with the maintenance or use of the insured location as a farm. These duties include the
 maintenance or use of an insured’s farm equipment. But farm employee does not mean any
 employee while engaged in an insured’s business.” Scuderi Decl., Ex. A (Policy) at GRANGE
 0932. The Policy does not define “volunteer workers.”

1 **H. Present Motions for Summary Judgment**

2 Black and Wrede move for partial summary judgment and declaratory relief on the
3 issue of whether Grange breached its duty to defend. Grange moves for summary judgment
4 dismissal of Plaintiffs’ “claims of insurance bad faith, breach of contract, Consumer
5 Protection Act violations, and violations of RCW 48.30.015.” Def.’s Mot., docket no. 37,
6 at 1.⁴

7 **II. DISCUSSION**

8 **A. Summary Judgment Standard**

9 The Court should grant summary judgment if no genuine issue of material fact exists
10 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The
11 moving party bears the initial burden of demonstrating the absence of a genuine issue of
12 material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A fact is material if it
13 might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby,
14 Inc., 477 U.S. 242, 248 (1986). When a properly supported motion for summary judgment
15 has been presented, the adverse party “may not rely merely on allegations or denials in its
16 own pleading.” Fed. R. Civ. P. 56(e). Rather, the non-moving party must set forth “specific
17 facts” demonstrating the existence of a genuine issue for trial. Id.; Anderson, 477 U.S. at
18 256.

19 **B. Cross-Motions for Summary Judgment Re: Breach of Duty to Defend**

20 The parties have filed cross-motions for summary judgment on the issue of whether
21 Grange breached its duty to defend Black and Wrede.⁵ Summary judgment is appropriate on
22 the issue of whether Grange breached its duty to defend because “the interpretation of

23
24 ⁴ Grange does not address Plaintiffs’ claim for negligence. See Compl. ¶¶ 12, 17.

25 ⁵ Plaintiffs do not clearly enumerate their claims in their Complaint, nor do they assert
26 that their motion for declaratory judgment/partial summary judgment seeks to resolve any
particular claim. This ruling expressly does not reach Plaintiffs’ breach of contract claim
because Plaintiffs have not proven that they are, in fact, insureds under the Policy. That claim
remains in the case.

1 language in an insurance policy is a matter of law.” Allstate Ins. Co. v. Peasley, 131 Wn.2d
2 420, 423-24 (1997); see also Woo v. Fireman’s Fund Ins. Co., 161 Wn.2d 43, 52 (2007)
3 (“Interpretation of an insurance contract is a question of law”). A court is to “construe the
4 language of an insurance policy . . . [by] giv[ing] it the same construction that an ‘average
5 person purchasing insurance’ would give the contract.” Woo, 161 Wn.2d at 52 (quoting
6 Roller v. Stonewall Ins. Co., 115 Wn.2d 679, 682 (1990)).

7 **1. Duty to Defend**

8 The duty to defend “is broader than the duty to indemnify.” Woo, 161 Wn.2d at 52.
9 The duty to defend “arises at the time an action is first brought, and is based on the potential
10 for liability.” Id. (quoting Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wn.2d 751, 760
11 (2002)). “An insurer has a duty to defend ‘when a complaint against the insured, construed
12 liberally, alleges facts which could, if proven, impose liability upon the insured within the
13 policy’s coverage.’” Woo, 161 Wn.2d at 52-53 (quoting Truck Ins., 147 Wn.2d at 760). In
14 determining the duty to defend an alleged “omnibus insured,” Washington applies this
15 “prospective test” to base the duty on the allegations of the underlying complaint. See
16 Holland Am. Ins. Co. v. Nat’l Indemnity Co., 75 Wn.2d 909, 911, 914-15 (1969) (“[I]t is
17 well established in this . . . jurisdiction[] that the insurer’s duty to defend, unlike its duty to
18 pay, arises when the complaint is filed and is to be determined from the allegations of the
19 complaint.”). The “prospective test” stands in contrast to the “ultimate showing or
20 retrospective test.” See Williams v. Community Drive-In Theatre, Inc., 3 Kan.App.2d 352,
21 353-55 (Kan. Ct. App. 1979) (summarizing the two approaches). Accordingly, Grange’s
22 reliance on cases, such as Williams, 3 Kan.App.2d 352, Navajo Freight Lines, Inc. v. Liberty
23 Mutual Insurance Company, 471 P.2d 309 (Ariz. Ct. App. 1970), and Ricciardi v.
24 Bernasconi, 105 N.J. Super. 525 (N.J. Super. Ct. Law Div. 1969), which apply the ultimate
25 showing or retrospective test, is misplaced. See Def.’s Reply, docket no. 44, at 10.

1 In Holland America, the Washington Supreme Court addressed the issue of whether
2 an insurer who has issued a policy of automobile liability insurance is obliged to defend a
3 person who is not the named insured but is allegedly an insured under the omnibus clause,
4 which provides coverage for any person using the automobile with the permission of the
5 named insured. 75 Wn.2d at 909. The Holland America Court held that “the duty to . . .
6 defend a person alleged to have been driving with the permission of its named insured is to
7 be determined from the allegations of the complaint and does not depend on the actual fact of
8 permission, that fact being one which the plaintiff must establish in order to recover, but
9 which the driver is not obliged to prove in order to be entitled to defense.” Id. at 914-15.
10 The Court reiterated its previously-taken position that an insurer “could not stand aloof from
11 the action on the basis of its unilateral determination that the driver was not insured, and, . . .
12 escape responsibility for the expenses of defending him.” Id. at 911 (citing Western Pac. Ins.
13 Co. v. Farmers Ins. Exch., 69 Wn.2d 11 (1966)).

14 In Holland America and Western Pacific, the Washington Supreme Court recognized
15 the existence of at least a putative contractual relationship between an insurer and an alleged
16 insured. The Holland America Court stated that in light of the omnibus provision in the
17 insurance policy, “[t]he insurer expressly undertakes to defend such suits [involving a person
18 alleged to have been driving with permission of the driver], and we know of no sound reason
19 why it should not be held to its contract.” 75 Wn.2d at 914. The Western Pacific Court
20 stated that an insurer who issued a policy “with potential coverage extend[ing] to nonowner
21 drivers under the omnibus clause had a clearly recognizable contractual concern with the
22 defense of [those nonowner drivers].” 69 Wn.2d at 18.

23 “An insurer is not relieved of its duty to defend unless the claim alleged in the
24 complaint is ‘clearly not covered by the policy.’” Woo, 161 Wn.2d at 53 (quoting Truck
25 Ins., 147 Wn.2d at 760); Scottish & York Int’l Ins. Group v. Ensign Ins. Co., 42 Wn. App.
26 158, 160 (Wash. Ct. App. 1985). “[I]f a complaint is ambiguous, a court will construe it

1 liberally in favor of triggering the insurer’s duty to defend.” Woo, 161 Wn.2d at 53. “There
2 are two exceptions to the rule that the duty to defend must be determined only from the
3 complaint, and both the exceptions favor the insured.” Woo, 161 Wn.2d at 53 (quoting
4 Truck Ins., 147 Wn.2d at 761). “First, if it is not clear from the face of the complaint that the
5 policy provides coverage, but coverage could exist, the insurer must investigate and give the
6 insured the benefit of the doubt that the insurer has a duty to defend.” Id. “Second, if the
7 allegations in the complaint conflict with facts known to or readily ascertainable by the
8 insurer, or if the allegations are ambiguous or inadequate, facts outside the complaint may be
9 considered.” Id. at 54 (quoting Truck Ins., 147 Wn.2d at 761) (internal quotations omitted).
10 “The insurer may not rely on facts extrinsic to the complaint to deny the duty to defend – it
11 may do so only to trigger the duty.” Id.⁶

12 “The duty to defend is a valuable service paid for by the insured and one of the
13 principal benefits of the liability insurance policy.” Id. “If the insurer is uncertain of its duty
14 to defend, it may defend under a reservation of rights and seek a declaratory judgment that it
15 has no duty to defend.” Id. “Although the insurer must bear the expense of defending the
16 insured, by doing so under a reservation of rights and seeking a declaratory judgment, the
17 insurer avoids breaching its duty to defend and incurring the potentially greater expense of
18 defending itself from a claim of breach.” Id.

19 Keeping these standards in mind, the Court must now determine whether the Haerer
20 Complaint, construed liberally, alleges facts which could, if proven, impose liability upon
21 Black and Wrede within the Policy’s coverage.⁷

24 ⁶ Grange has not brought any authority to the attention of the Court, nor is the Court
25 aware of any authority, that would preclude this jurisprudence from applying to *alleged* insureds
under an insurance policy.

26 ⁷ Although the parties rely heavily on extrinsic evidence to make their arguments, the
Court focuses its inquiry on the allegations in the Haerer Complaint and the language in the
Policy.

1 **2. Status as “Residents of Your Household Who Are Your Relatives”**

2 Section II(1)(a)(1) of the liability portion of the Policy defines an “insured” as “you,
3 and if you are [a]n individual: (1) Residents of your household who are your relatives.”
4 Scuderi Decl., Ex. A (Policy) at GRANGE 0928. Plaintiffs do not argue that Black is an
5 insured under this provision.⁸ Instead, Plaintiffs argue that Wrede is an insured under this
6 provision because she lived with Black at the farm at the time of the accident and was
7 married to him. Black, however, is not the named insured in the policy, and therefore
8 Plaintiffs’ analysis is incorrect.

9 The Policy’s reference to “you” is to Paula Einstein, the named insured. *Id.*, Ex. A
10 (Policy) at GRANGE 0918 (“Throughout this Coverage Form the words **you** and **your** refer
11 to the Named Insured shown in the Declarations”) (emphasis in original). The Haerer
12 Complaint does not allege that Wrede was a resident of Einstein’s household or was
13 Einstein’s relative. See generally Scuderi Decl., Ex. G (Haerer Compl.). Accordingly,
14 Section II(1)(a)(1) does not apply, and Grange did not breach its duty to defend Wrede based
15 on Section II(1)(a)(1)’s definition of an “insured.”

16 **3. Status as Partner in the “Paula Einstein” Partnership**

17 Section II(1)(b) of the liability portion of the Policy defines an “insured” as “you, and
18 if you are [a] partnership or joint venture, your members, your partners, and their spouses are
19 also insureds, but only with respect to the conduct of your farming operations.” Scuderi
20 Decl., Ex. A (Policy) at GRANGE 0928. Black argues that he should be considered an
21 insured under the Policy as a partner in the “Paula Einstein” partnership, and he relies on the
22 Haerer Complaint’s allegation of a partnership between Black and Einstein. See Scuderi
23 Decl., Ex. G (Haerer Compl.) ¶ 3.6.⁹

24
25 ⁸ Plaintiffs’ briefs did not make this argument, and, at oral argument, Plaintiffs’
counsel conceded that Black did not fall within Section II(1)(a)(1), (2), or (3) of the Policy.

26 ⁹ Plaintiffs also argue that they are insureds under Section II(1)(b) because “Black and
Einstein both co-owned the horse farm that was insured through Grange at the time of the

1 Black's "Paula Einstein" partnership argument fails because, as noted above, the
2 Policy's reference to "you" is to Paula Einstein, the named insured. Scuderi Decl., Ex. A
3 (Policy) at GRANGE 0918. The Policy expressly provides that "No person or organization
4 is an insured with respect to the conduct of any current or past partnership, joint venture or
5 limited liability company that is not shown as a Named Insured in the Declarations." Id., Ex.
6 A (Policy) at GRANGE 0929. The "Liability Declarations" page of the Policy does not
7 identify any partnership or indicate that "Paula Einstein" signifies a partnership. Scuderi
8 Decl., Ex. A (Policy) at GRANGE 0858. The Court may rely on the Declarations Page of the
9 Policy to determine the identity of the named insured. See Smith v. Cont'l Cas. Co., 128
10 Wn.2d 73, 80 (1995) (relying on the declarations page of the policy for the identification of
11 "covered autos"); Kelly v. Aetna Cas. & Sur. Co., 100 Wn.2d 401, 403 (1983) (relying on the
12 declaration page of the policy for the list of vehicles that were specifically insured).

13 At oral argument, Plaintiffs' counsel argued that the application for insurance should
14 have been filled out on behalf of a partnership. First, the Court does not consider the
15 application for insurance, which is extrinsic evidence, to find that the named insured under
16 the Policy is Paula Einstein. The Policy is unambiguous in this regard. See Alea London
17 Ltd. v. Bickford, 627 F. Supp. 2d 763, 770 (S.D. Tex. 2009) (holding that "[n]either D.R.
18 Bickford & Sons, Inc. nor Bickford & Sons, L.P. is a named insured . . . where the policy
19 unambiguously lists "David Bickford" as the named insured). Second, even if the Court
20 were to consider the application for insurance, the Court would have to consider the
21 application as it was written, not as it might have been written. The application for insurance
22
23

24 occurrence." Pls.' Mot. at 8:13-14. Although the Haerer Complaint alleges co-ownership of the
25 horse farm by Black and Einstein, see Scuderi Decl., Ex. G (Haerer Compl.) ¶¶ 1.2, 1.3, the
26 Policy does not base its definition of an "insured" on ownership of the farm. Cf. Wiese v. Mut.
of Enumclaw, 49 Wn. App. 906, 910 (Wash. Ct. App. 1987) (involving a "boat owner's
supplement" that extended coverage for "Bodily Injury or Property Damage arising out of the
ownership . . . of the watercraft"). Accordingly, the Court rejects this argument.

1 clearly applied for coverage for an individual, not a partnership. Plaintiffs' counsel admitted
2 at oral argument that Plaintiffs' argument under Section II(1)(b) was "weak."

3 Section II(1)(b) does not apply to allow coverage to Black (or Wrede) by way of
4 Black's alleged partnership with Einstein because the Policy unambiguously lists "Paula
5 Einstein" as the named insured. Grange did not breach its duty to defend Black (or Wrede)
6 based on Section II(1)(b)'s definition of an "insured."

7 **4. Status as "Volunteer Worker" or "Farm Employee"**

8 Section II(2)(a) of the liability portion of the Policy provides that "[e]ach of the
9 following is also an insured: Your volunteer workers only while performing duties related to
10 your farming, or your farm employees . . . , but only for acts within the scope of their
11 employment by you or while performing duties related to your farming." Scuderi Decl., Ex.
12 A (Policy) at GRANGE 0928-0929. Although the Haerer Complaint does not expressly
13 allege that Black and Wrede were Einstein's "volunteer workers" or "farm employees," the
14 allegations in the Haerer Complaint, liberally construed, trigger this provision, and thus
15 trigger Grange's duty to defend.

16 In essence, Haerer alleges that she was injured by a horse on Einstein's horse farm as
17 a result of Black and Wrede's negligence. Specifically, the Haerer Complaint alleges that
18 Einstein and Black owned interests in the real property on which a horse farm was situated
19 (§§ 1.2, 1.3); that, at the time of the accident, Black and Wrede resided on the farm and ran a
20 horse training program there (§§ 1.2, 2.1); that the facilities for the horse training program
21 were a horse farm provided by Black and Einstein (§ 2.1); that, as part of the horse training
22 program, Haerer fed, cleaned, rode and helped train horses (§ 2.2); that Einstein and Black
23 were partners in a horse business operated on the farm (§§ 1.2, 1.3, 2.3, 3.6); that Haerer's
24 injuries were caused by a horse that was part of the "horse business" that Einstein conducted
25 and participated in with Black (§ 2.3); that Haerer's injuries were caused by the horse while
26 Haerer was feeding the horse (§ 2.6); that Black and Wrede were negligent in leaving Haerer

1 alone on the farm with another young trainee to care for thirty horses and a toddler (§§ 2.5,
2 3.1-3.3); and that Einstein profited from the “horse farming business and other activities
3 conducted on the horse farm” by Black (§3.6). These allegations, liberally construed, have
4 the potential to bring Black and Wrede within the Policy’s coverage of Einstein’s volunteer
5 workers or farm employees under Section II(2)(a).

6 In denying Black and Wrede’s defense, Grange asserted that “[t]here is no allegation
7 in the complaint that Ms. Haerer was injured when Mr. Black or Ms. Wrede were engaged in
8 farming activities as defined in Form 2000 0305.” Scuderi Decl., Ex. D at 158. Grange also
9 asserted that “the horse training program operated by Mr. Black and Ms. Wrede that Ms.
10 Haerer was participating in during 2006 can not be construed as an agricultural or
11 aquacultural enterprise to qualify as farming in order for the liability coverage to apply.” Id.,
12 Ex. D at 158. The Court disagrees with Grange’s interpretation of the allegations of the
13 Haerer Complaint. Furthermore, the Court also rejects Grange’s reliance on extrinsic
14 evidence to deny a defense to Black and Wrede. See Woo, 161 Wn.2d at 54 (extrinsic
15 evidence may only be relied upon to trigger the duty to defend). Grange cannot “stand aloof”
16 from the Haerer action on the basis of its unilateral determination that Black and Wrede were
17 not Einstein’s volunteer workers or farm employees alleged to be negligent in performing
18 their farming duties (i.e., maintaining the horses) at the time of the Haerer accident. See
19 Holland America, 75 Wn.2d at 911; Western Pac., 69 Wn.2d at 18.

20 The Haerer Complaint alleges numerous facts that can be construed to assert that
21 Haerer’s injuries arose from the negligence of Black and Wrede in operating Einstein’s horse
22 farm. Admittedly, the Haerer Complaint is ambiguous in terms of defining the exact nature
23 of the relationship between, on the one hand, Einstein, and, on the other hand, Black and
24 Wrede. However, “if a complaint is ambiguous, a court will construe it liberally in favor of
25 triggering the insurer’s duty to defend.” Woo, 161 Wn.2d at 53. Accordingly, this Court
26 construes the Haerer Complaint liberally in favor of triggering Grange’s duty to defend and

1 holds that Grange breached its duty to defend Black and Wrede based on Section II(2)(a)'s
2 definition of an "insured."

3 **5. Status as "Real Estate Manager"**

4 Section II(2)(b) of the liability portion of the Policy defines an "insured" as "[a]ny
5 person (other than your farm employee or volunteer worker), or any organization while
6 acting as your real estate manager." Scuderi Decl., Ex. A (Policy) at GRANGE 0929. Black
7 argues that he qualifies as a "real estate manager" under the Policy.

8 The Policy does not define "real estate manager," and the Court is not aware of any
9 Washington case construing "real estate manager" language in an insurance policy. Other
10 courts have construed "real estate manager" language to mean "simply one who manages real
11 estate for another." See, e.g., Dempsey v. Clark, 847 So.2d 133, 137 (La. Ct. App. 2003)
12 (citations omitted); see also Sumitomo Marine & Fire Ins. Co. of America v. Southern Guar.
13 Ins. Co. of Georgia, 337 F. Supp. 2d 1339 (N.D. Ga. 2004) (adopting plaintiff's expert
14 definition of "real estate manager" as "those who rent, maintain rental premises, keep the
15 books and kindred duties for property owners").

16 The policy at issue in Dempsey contained the "while acting as real estate manager"
17 language, which is nearly identical to the "while acting as your real estate manager" language
18 in the Policy at issue here. See Dempsey, 847 So.2d at 138. The Dempsey court rejected the
19 alleged insured's "real estate manager" argument not on the grounds that he was not the
20 manager, but because the alleged injury (a dog bite) did not occur while the alleged insured
21 was acting in the capacity of real estate manager for the named insured. See id. at 138-39.
22 Other courts have similarly determined coverage based on whether the underlying injury
23 occurred while the alleged insured's was acting in the capacity of real estate manager. See,
24 e.g., Western Alliance Ins. Co. v. Northern Ins. Co. of New York, 176 F.3d 825, 830 (5th
25 Cir. 1999) (discussing whether the underlying complaint alleged that the alleged insured was
26 acting in his capacity as a building manager for the named insured when he hired an

1 uncertified handyman rather than a professional to install a water heater and when he failed
2 to inspect dysfunctional smoke detectors); Russell v. Clapp, 201 S.W.3d 99, 103 (Mo. Ct.
3 App. 2006) (requiring a showing that the alleged insured was a real estate manager *and* that
4 the injury arose from the alleged insured's activities as a real estate manager); Bewig v. State
5 Farm Fire and Cas. Ins. Co., 848 S.W.2d 521, 522 (Mo. Ct. App. 1993) (denying coverage
6 for a tenant/property manager of the named insured whose dog bit a mail carrier, reasoning
7 that the insurance "obviously does not protect employees or agents [acting] in their
8 individual capacities unrelated to the landlord's interests").

9 Here, the Haerer Complaint makes no allegations that Black was Einstein's real estate
10 manager or that Haerer's injuries occurred while Black was acting in his capacity as
11 Einstein's real estate manager. In contrast, in Western Alliance, the underlying complaint
12 alleged injuries caused by a real estate manager's negligence regarding the installation of a
13 water heater and inspection of smoke detectors. 176 F.3d at 830. Haerer alleges Black's
14 negligence with respect to the operation of the horse training program and the management
15 of the horses on the horse farm, and not with respect to Black's real estate management, such
16 as rental units on the property, the execution of property-related contracts, or the payment of
17 insurance premiums. Section II(2)(b) does not apply to allow coverage to Black as Einstein's
18 "real estate manager," and Grange did not breach its duty to defend Black based on Section
19 II(2)(b)'s definition of an "insured."

20 **6. Conclusion Re: Duty to Defend**

21 The Court GRANTS Plaintiffs' motion for declaratory judgment/partial summary
22 judgment and DENIES Defendant's motion for summary judgment on the issue of Grange's
23 duty to defend. Grange breached the duty to defend Black and Wrede based on the
24 allegations in the Haerer Complaint and the Policy's Section II(2)(a)'s definition of an
25 "insured."

1 **C. Defendant’s Motion for Summary Judgment Re: Plaintiffs’ Bad Faith**
2 **Claim**

3 “[A]n insurer has a duty of good faith to its policyholder and violation of that duty
4 may give rise to a tort action for bad faith.” Smith v. Safeco Ins. Co., 150 Wn.2d 478, 484
5 (2003) (en banc). “Claims by insureds against their insurers for bad faith are analyzed
6 applying the same principles as any other tort: duty, breach of that duty, and damages
7 proximately caused by any breach of duty.” Id. at 485. “[T]o succeed on a bad faith claim, a
8 policyholder must show the insurer’s breach of the insurance contract was unreasonable,
9 frivolous, or unfounded.” Id. “Whether an insurer acted in bad faith remains a question of
10 fact.” Id.

11 Grange moves for summary judgment dismissal of Plaintiffs’ bad faith claim, arguing
12 that Grange did not breach its policy of insurance. Alternatively, Grange argues that its
13 denial of coverage was based on a reasonable interpretation of the insurance policy. Grange
14 also argues that there is no Washington case imposing a duty of good faith upon an insurer
15 with respect to a non-insured. Because the Court finds that Black and Wrede are potential
16 insureds under the Policy, the Court DENIES Grange’s motion for summary judgment on
17 Plaintiffs’ bad faith claim.

18 **D. Defendant’s Motion for Summary Judgment Re: Plaintiffs’ Washington**
19 **Consumer Protection Act Claim**

20 To sustain a Washington Consumer Protection Act (“CPA”) claim, a claimant must
21 show: “(1) an unfair or deceptive act or practice; (2) occurring in trade or commerce;
22 (3) public interest impact; (4) injury to plaintiff in his or her business or property; [and]
23 (5) causation.” Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d
24 778, 780 (1986). Grange argues that “a reasonable basis for denial of an insured’s claim
25 constitutes a complete defense to any claim that the insurer acted in violation of the CPA.”
26 Def.’s Mot. at 16:9-12. The Court cannot conclude, as a matter of law, that it was reasonable

1 for Grange to deny Black and Wrede's defense based on the allegations of the Haerer
2 Complaint. Accordingly, the Court DENIES Grange's motion for summary judgment on
3 Plaintiffs' Washington CPA claim.

4 **E. Defendant's Motion for Summary Judgment Re: Plaintiffs' Insurance Fair**
5 **Conduct Act Claim**

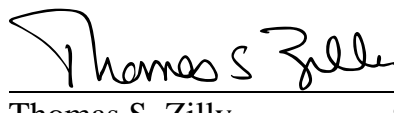
6 Defendant moves for summary judgment on Plaintiffs' Insurance Fair Conduct Act
7 claim, arguing that Grange "correctly denied coverage to plaintiffs in this case because they
8 were not insured under Einstein's policy of insurance." Def.'s Mot. at 24:9-11. The Court
9 DENIES Grange's motion for summary judgment on Plaintiffs' Insurance Fair Conduct Act
10 claim.

11 **III. CONCLUSION**

12 The Court GRANTS Plaintiffs' Motion for Declaratory Judgment/Partial Summary
13 Judgment Regarding Grange Insurance's Duty to Defend, docket no. 14, and DENIES
14 Defendant's Motion for Summary Judgment, docket no. 37.

15 IT IS SO ORDERED.

16 DATED this 19th day of November, 2009.

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19 Thomas S. Zilly
20 United States District Judge
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